

NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

JEFFERY L. HILTS,	:	
a/k/a Jeffrey L. Hilts,	:	
	:	Civil Action No. 08-1762 (JBS)
Petitioner,	:	
	:	
v.	:	OPINION
	:	
WARDEN J. GRONDOLSKY,	:	
	:	
Respondent.	:	

APPEARANCES:

Petitioner pro se
Jeffery L. Hilts
F.C.I. Fort Dix
Box 2000
Fort Dix, NJ 08640

SIMANDLE, District Judge

Petitioner Jeffery L. Hilts, a prisoner currently confined at the Federal Correctional Institution at Fort Dix, New Jersey, has submitted a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241¹ and an application for leave to proceed in forma pauperis. The sole respondent is Warden Paul Schultz.

¹ Section 2241 provides in relevant part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.

...

(c) The writ of habeas corpus shall not extend to a prisoner unless-- ... (3) He is in custody in violation of the Constitution or laws or treaties of the United States

Based upon his affidavit of indigence, this Court will grant Petitioner's application for leave to proceed in forma pauperis. Because it appears from a review of the Petition that this Court lacks jurisdiction to consider this Petition, and that it is not in the interest of justice to transfer the Petition, the Court will dismiss the Petition. See 28 U.S.C. §§ 1631, 2243, 2244(a), 2255.

I. BACKGROUND

According to the allegations of his Petition, as supported by the records in other federal courts,² Petitioner was convicted pursuant to a guilty plea, in the U.S. District Court for the Northern District of New York, of using and carrying six firearms during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1). The remaining counts of the indictment were dismissed. On August 5, 1992, Petitioner was sentenced to imprisonment for a term of sixty months, to be followed by supervised release for three years. Petitioner did not appeal his conviction or sentence. See United States v. Hilts, Criminal Action No. 92-0069 (N.D.N.Y.).

² This Court will take judicial notice of the dockets of other federal courts in cases related to this Petition. See Fed.R.Evid. 201; Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 426-27 (3d Cir. 1999) (federal court, on a motion to dismiss, may take judicial notice of another court's opinion, not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity).

In December 1995, the Supreme Court of the United States held in Bailey v. United States, 516 U.S. 137 (1995), that a conviction for "use" of a firearm under § 924(c)(1) requires the government to show "active employment of the firearm." 516 U.S. at 144. As the Court explained, active employment includes uses such as "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire" the weapon. 516 U.S. at 148. "Use" does not include mere possession of a firearm; thus, a "defendant cannot be charged under § 924(c)(1) merely for storing a weapon near drugs or drug proceeds," or for "placement of a firearm to provide a sense of security or to embolden." Id. at 143, 149.³

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 ("AEDPA"), which created a one-year period of limitation in which to file a motion to vacate, correct, or set aside a sentence under 28 U.S.C. § 2255. Federal courts uniformly have given prisoners whose convictions became final before the enactment of AEDPA a one-year grace period in which to file a § 2255 motion. See Johnson v. United States, 544

³ On May 18, 1998, the Supreme Court held that the rule announced in Bailey can be asserted in a collateral attack under § 2255 where the defendant demonstrates either cause and actual prejudice for the failure to raise the issue on direct appeal or that he is actually innocent. See Bousley v. United States, 523 U.S. 614 (1998).

U.S. 295, 300 (2005); Mickens v. United States, 148 F.3d 145, 148 (2d Cir. 1998).

On January 18, 2006, Petitioner filed a motion under § 2255, in the court of his conviction, challenging his conviction on the grounds that he was actually innocent of the crime, pursuant to the construction of § 924(c) announced by the Supreme Court in the Bailey decision. See Hilts v. United States, Civil Action No. 05-0145 (N.D.N.Y.). The trial court denied the motion as untimely. The Court of Appeals for the Second Circuit denied Petitioner a certificate of appealability. See Hilts v. United States, Consolidated Appeals Nos. 07-0188, 07-1042 (2d Cir.).

This Petition, under 28 U.S.C. § 2241 here in the district of confinement, followed. Here, Petitioner asserts the same claim asserted in his § 2255 motion, that he is actually innocent of the crime of conviction under the interpretation of § 924(c)(1) announced by the Supreme Court in Bailey. Petitioner alleges that he is actually innocent of the crime because, at the time of his arrest, he had no firearms or drugs in his possession. He states that six firearms and 22.68 grams of cocaine were located when federal officers executed a search warrant at his residence. The firearms were located in the bedroom closet and the cocaine was found outside of the apartment on the rear porch in the garbage. Petitioner argues that he should be permitted to pursue this claim through a § 2241

petition because his remedy under § 2255 is "inadequate and ineffective," as his § 2255 petition was deemed time-barred.

II. STANDARDS FOR A SUA SPONTE DISMISSAL

United States Code Title 28, Section 2243 provides in relevant part as follows:

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

A pro se pleading is held to less stringent standards than more formal pleadings drafted by lawyers. Estelle v. Gamble, 429 U.S. 97, 106 (1976); Haines v. Kerner, 404 U.S. 519, 520 (1972). A pro se habeas petition and any supporting submissions must be construed liberally and with a measure of tolerance. See Royce v. Hahn, 151 F.3d 116, 118 (3d Cir. 1998); Lewis v. Attorney General, 878 F.2d 714, 721-22 (3d Cir. 1989); United States v. Brierley, 414 F.2d 552, 555 (3d Cir. 1969), cert. denied, 399 U.S. 912 (1970). Nevertheless, a federal district court can dismiss a habeas corpus petition if it appears from the face of the petition that the petitioner is not entitled to relief. See Lonchar v. Thomas, 517 U.S. 314, 320 (1996); Siers v. Ryan, 773 F.2d 37, 45 (3d Cir. 1985), cert. denied, 490 U.S. 1025 (1989). See also 28 U.S.C. §§ 2243, 2255.

III. ANALYSIS

Here, Petitioner contends that he is entitled to habeas relief under § 2241, despite the facts that he has filed a previous § 2255 motion and that the Court of Appeals for the Second Circuit has previously denied him a certificate of appealability on the very claim urged in this Petition, because he is "actually innocent" and because relief under § 2255 now is time-barred and, thus, is "inadequate or ineffective." Cf. In re Dorsainvil, 119 F.3d 245 (3d Cir. 1997).

As noted by the Court of Appeals for the Third Circuit in Dorsainvil, 119 F.3d at 249, § 2255 has been the "usual avenue" for federal prisoners seeking to challenge the legality of their confinement. See also Chambers v. United States, 106 F.3d 472, 474 (2d Cir. 1997); Wright v. United States Bd. of Parole, 557 F.2d 74, 77 (6th Cir. 1977); United States v. Walker, 980 F.Supp. 144, 145-46 (E.D. Pa. 1997) (challenges to a sentence as imposed should be brought under § 2255, while challenges to the manner in which a sentence is executed should be brought under § 2241). Motions under § 2255 must be brought before the Court which imposed the sentence. See 28 U.S.C. § 2255. In addition, before a second or successive § 2255 motion is filed in the district court, the petitioner must move in the appropriate court of appeals for an order authorizing the district court to consider the petition on the grounds of either (1) newly-discovered

evidence that would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the petitioner guilty of the offense or (2) a new rule of constitutional law made retroactive by the Supreme Court. 28 U.S.C. §§ 2244(a), 2255.

Section 2255, however, contains a safety valve where "it appears that the remedy by motion is inadequate or ineffective to test the legality of [Petitioner's] detention." In Dorsainvil, a case involving a Bailey claim, the Third Circuit held that the remedy provided by § 2255 is "inadequate or ineffective," permitting resort to § 2241 (a statute without timeliness or successive petition limitations), where a prisoner who previously had filed a § 2255 motion on other grounds "had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate." 119 F.3d at 251. The court emphasized, however, that its holding was not intended to suggest that § 2255 would be considered "inadequate or ineffective" merely because a petitioner is unable to meet the stringent gatekeeping requirements of § 2255. Id. To the contrary, the court was persuaded that § 2255 was "inadequate or ineffective" in the unusual circumstances presented in Dorsainvil because it would have been a complete miscarriage of justice to confine a prisoner for conduct that, based upon an intervening interpretation of the statute of conviction by the United States

Supreme Court, may not have been criminal conduct at all. Id. at 251-52.

Here, Petitioner does allege that he is being confined for conduct that is not criminal, the Dorsainvil exception. Petitioner can not establish, however, that he had "no earlier opportunity" to challenge his conviction based upon the Bailey decision. To the contrary, Petitioner did present this challenge to the trial court, which found it time-barred,⁴ and to the Court of Appeals for the Second Circuit, which declined to issue a certificate of appealability, in a prior § 2255 motion. Petitioner can not demonstrate that the circumstances constitute the sort of "complete miscarriage of justice" that would justify application of the safety-valve language of § 2255 rather than its gatekeeping requirements. Section 2255 is not "inadequate or ineffective" merely because a prior § 2255 motion was deemed untimely.

Thus, this Petition must be considered a second or successive motion under § 2255, which Petitioner has not received

⁴ The trial court noted that Petitioner's § 2255 motion was filed more than eight and one-half years after the one-year AEDPA grace period expired on April 24, 1997. The trial court found "insufficient and unpersuasive" Petitioner's argument that the prison law library and paralegal resources were inadequate during the interim. Hilts v. United States, Civil Action No. 05-0145, Memorandum Decision and Order at 6-7 (N.D.N.Y. Dec. 7, 2006).

authorization to file, and over which this Court, in the district of confinement, lacks jurisdiction.⁵ 28 U.S.C. § 2255.

Whenever a civil action is filed in a court that lacks jurisdiction, "the court shall, if it is in the interest of justice, transfer such action ... to any other such court in which the action ... could have been brought at the time it was filed." 28 U.S.C. § 1631.

Petitioner has not alleged facts to bring this Petition within the gatekeeping requirement of § 2255 permitting "second or successive" petitions based upon newly discovered evidence sufficient to establish that no reasonable factfinder would have found the movant guilty of the offense or a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court. Moreover, the Court of Appeals for the Second Circuit has already denied Petitioner a certificate of appealability in his § 2255 motion asserting this same claim.

⁵ Although this Court is reclassifying Petitioner's petition as a § 2255 motion, no Miller notice and order is necessary to afford Petitioner an opportunity to raise additional § 2255 grounds. The purpose of the Third Circuit's decision in United States v. Miller, 197 F.3d 644 (3d Cir. 1999), was to provide fair warning to petitioners whose petitions were being recharacterized as § 2255 motions so that they could ensure that all their claims were fully raised in a single all-encompassing § 2255 petition. Such warning, the Miller court reasoned, is necessary because petitioners will thereafter be unable to file "second or successive" § 2255 petitions without certification by the Court of Appeals. Because Petitioner in this case has already filed a § 2255 motion in the sentencing court, and because the current Petition is itself "second or successive," no purpose would be served by a Miller notice.

Accordingly, it does not appear that it would be in the interest of justice to transfer this Petition to the Court of Appeals for the Second Circuit.

Finally, this Court expresses no opinion as to the merits of Petitioner's claims.

IV. CONCLUSION

For the reasons set forth above, the Petition must be dismissed without prejudice for lack of jurisdiction. An appropriate order follows.

s/ Jerome B. Simandle
Jerome B. Simandle
United States District Judge

Dated: **December 23, 2008**